(Testimony of Mrs. Elynore M. McKenna.)

A. Every day if he was there.

Q. What do you mean by if he was there?

A. I mean if he was in town.

Mr. Faulkner: I do not understand this testimony, Mr. Pratt said he wanted to establish the simple fact that Mr. Menges was in the employ of Nye & Nissen during the year 1944.

Mr. Pratt: And performing the same functions as appeared at other times from the testimony.

Mr. Faulkner: You are asking about Mr. Moncharsh and these various other people. I indicated to the Court that if you confined this evidence to that, I would have no questions of the witness.

Mr. Houck: I have only two more questions, your Honor.

Mr. Faulkner: I will withdraw any objection.

Mr. Houck: Q. Have you seen Mr. Moosman and Mr. Reed, the Department of Agriculture inspectors, at the plant?

A. Yes, I have.

Q. And on those occasions you saw them at the plant who did you observe was helping them with their inspection of the eggs?

A. Mr. Menges or Ruby Goddard.

Q. And during what period was that?

A. Well, up until the [3076] time I left the employment.

Q. But from what period? Is that the entire employment there at Nye & Nissen?

A. Yes.

Mr. Houck: That is all.

(Testimony of Mrs. Elynore M. McKenna.)

Cross-Examination

Mr. Faulkner: Q. Is it Miss or Mrs.?

A. Mrs.

Q. Mrs. McKenna, did I understand that you were there from 1933 to 1934 to 1935?

A. I was there from 1930.

Q. From 1930?

A. To January of 1945.

Q. So that you were in both the Townsend Street place and out in the new place?

A. That is right.

Q. In that period of time you were an egg candler? A. That is right.

Q. And I think you said that you worked in a butter room? A. That is right.

Q. Did you work in the butter room in both plants? A. Yes.

Q. And Mr. Menges was the man in charge of the girls in the candling room? A. Yes.

Q. And there would be about how many girls usually?

A. Five or six girls.

Q. And he would direct them what to do, is that right? A. That is right.

Q. And then in the butter room the girls would do various work in there?

A. That is right.

Q. And you would receive directions from Mr. Menges? [3077]

A. That is right.

(Testimony of Mrs. Elynore M. McKenna.)

Q. And you would also receive directions from Mr. Goodard, wouldn't you?

A. Well, Mr. Menges was really the one who gave the orders.

Q. He was usually in the room, but you would take directions from any of the men in the plant, isn't that true? A. That is true.

Q. Regardless of who it was?

A. But Mr. Menges was the one who gave the girls the orders. He was with us all the time.

Q. That is correct, but I mean the girls would get orders from any of the men around the plant and they would follow those orders, is that right?

A. Well, it would either be Ruby Goddard or Ed Menges.

Q. That is right, and then on the egg candling was Mr. Menges the only one who gave orders?

A. Or Ruby Goddard, but Menges, mostly.

Q. And was that true practically the entire time that you were there? A. Yes.

Mr. Faulkner: Thank you very much. That is all.

Mr. Houck: That is all.

Mr. Pratt: If the Court please, this concludes the Government's evidence in this case. However, the Court will remember that during the course of the trial there was certain evidence that was offered only as to the conspiracy counts, owing to the fact that the substantive counts had not yet been [3078] established. I now move the Court to make all evidence, documentary and all, relating to deliveries

of eggs on ships, other than those mentioned in the substantive Counts 2 to 7, applicable to all of the substantive counts as similar transactions or offenses and touching the question of intent, excepting only the evidence relating to the steamship Hawaiian Shipper, which occurred in December 1944, which is applicable and is claimed to be applicable and is offered only as to the conspiracy counts.

I also ask the Court to make all the evidence on the sixth substantive count applicable to each and all of those counts as similar transactions or offenses, and that they may be made also applicable as overt acts in conspiracy counts.

Mr. Faulkner: If the Court please, in relation to Mr. Pratt's motion, we, of course, resist that motion. We have certain motions of our own, as your Honor is aware, and if it would be agreeable to your Honor, the law points that would be involved in Mr. Pratt's efforts to apply the evidence will run into the same field of the law applicable to our motion to strike and the whole field will be affected by our other motions, so may we discuss the applicability or, rather, discuss the law points involved in Mr. Pratt's motion at the same time that we discuss our own?

The Court: Very well.

Mr. Faulkner: Mr. Sullivan will make some motions. [3079]

Mr. Pratt: With that the Government rests.

Mr. Faulkner: It will be stipulated that whatever order your Honor makes with reference to Mr.

Pratt's motion will be deemed to have been made before he rested.

Mr. Pratt: Yes.

The Court: I have in mind the Jury. How much time do you wish?

Mr. Sullivan: If your Honor please, I think it will take quite a while to state the motion. It involves, as your Honor knows, around thirty-four hundred pages of testimony, and we have dictated it to our secretaries, and it was written out, so it can be presented in an orderly way.

The Court: Did you furnish a copy to the other side?

Mr. Sullivan: No, your Honor. Some of the motions will have to be added to orally by myself in view of the recent developments in the testimony. We have written out a draft here only for the purpose of reading it into the record.

Mr. Faulkner: I think we have to read it into the record.

Mr. Pratt: That has to be done in the presence of the Jury.

Mr. Faulkner: After the 21st we may be in a different position, but I think we have to read these motions and state them in the record in the presence of the Jury and then any discussion may be had in their absence.

The Court: I assume you gentlemen have looked into the [3080] matter as it is affected by the new rules. I have not. But whatever motions that are to be made can be made and then we can discuss the motions in the absence of the Jury.

Mr. Pratt: We will be glad to stipulate that they are made in the presence of the Jury.

Mr. Faulkner: We tried an antitrust case, ——

The Court: You can't stipulate. The Jury must be present when the motions themselves are made, but the discussion of them may be had in the absence of the Jury with the consent of both sides.

Mr. Faulkner: Having in mind the length of the motions and the fact that we are past the recess time, I think if we could take a short recess and then state the motions, it would be more convenient.

The Court: The jurors may be excused.

(Recess.) [3081]

The Court: Waive the roll call. Stipulated all the jurors are seated in the box. You may proceed.

Mr. Sullivan: At this time the following defendants, Nye & Nissen, a corporation, Abraham Moncharsh, Henry Eugene Berman, Ruby Holland Goddard and Edward LeRoy Menges, jointly and severally make the following motions to strike. The motions are made as to each defendant separately and individually. The reference in this motion to "this defendant" refers to each individual defendant, speaking in his own behalf. This motion is made as to each separate count in the indictment and is made as though it were separately stated as to each separate count of the indictment.

This defendant moves the Court in respect to each separate count of the indictment to strike out as to this defendant the following testimony and all exhibits introduced in evidence in connection

with such testimony, and each thereof, of the following witnesses:

The testimony of the witness, Henry Pineda, as set forth in a written motion for the exclusion of his testimony filed during the course of the above-entitled trial, copies whereof were served on counsel for the government. Said motion will be based upon all the grounds indicated in said written motion.

The testimony of Pearl Hugh Hand in respect to:

(A) The condition of certain eggs delivered at the Presidio in the year 1941 and seized and examined by the [3082] witness at the Headquarters Mess at the Presidio and in the pastry shop in the Letterman General Hospital at the Presidio.

(B) The candling and/or examination of eggs and the expression of opinions and conclusions in respect to the quality thereon on the Ships John Muir, Cape Pillar, Josiah Royce, Henry White and William Coulter, and all exhibits introduced in connection with his examination,

(C) A conversation with defendants Moncharsh and Goddard in relation to the duties and authorities of Langworthy in the Petaluma Plant of Nye & Nissen in the month of March, 1943.

(D) A conversation with Langworthy and Steffenhagen in rewiring and sealing cases. (See p. 395)

Said motion will be separately made as to each separate count and will be made upon all of the grounds set forth in the written motion filed in respect to the testimony of Henry Pineda on file

as part of the record in the trial, and upon additional grounds hereafter stated generally.

All of the testimony of Charles Ransome (p. 1214, et seq.) relating to a delivery of 45 cases of eggs at an unidentified time to an unidentified ship and which delivery has not been connected up in any subsequent testimony introduced in this case.

Said motion will be based upon all and each of the counts set forth in the motion filed in re Henry Pineda above referred to upon the ground that no foundation has been laid [3083] for the admission of the testimony into evidence, and the same is unnected and unrelated to the subject matter of the case or any particular delivery to any agency of the United States, and upon the further general grounds which will be hereafter set forth.

All of the testimony of Paul H. Debes (Tr. p. 1329, et seq.) relative to an examination of eggs after they had been placed aboard the Hawaiian Shipper, and his opinions and conclusions in relation to their quality and condition; the opinion and conclusion of the witness, Debes, in relation to the temperature and condition of the chill box aboard the Hawaiian Shipper.

Said motion will be based upon each of the counts set forth in the written motion relating to Pineda herein referred to, and the general counts hereafter stated.

The testimony of Sture Oscarsson, chief baker aboard the Hawaiian Shipper, relating to quality and condition of eggs, and an opinion and conclu-

sion relating to the condition of the chill box aboard said vessel.

Said motion will be based upon the same grounds as that above set forth in respect to Debes.

The testimony of witness Thomas Andrew Dolyn, cook aboard the Hawaiian Shipper, in relation to the quality of eggs observed by him subsequent to the delivery and when the ship was at sea. The eggs involved were Procurement No. 1. [3084]

The grounds of this motion will be the same as indicated in relation to Debes.

The testimony of James G. Mahoney, messman aboard the John Muir, in re the quality of eggs after the voyage started.

The grounds of this motion will be the same as indicated in relation to Debes.

The testimony of Haffel H. Brown, cook, and Homer G. Foster, night cook and baker, on board the William S. Clark, relating to the quality and condition of eggs and butter during the voyage and subsequent to delivery.

Said motion will be made upon all of the grounds set forth in respect to witness Debes.

The testimony of Wilbur J. Mills and H. B. Tillett relating to the presence of eggs in the Terminal Ice House and trucking of same to San Francisco.

Said motion will be based upon the ground that no evidence was presented that the eggs contained in the cases in the Terminal Ice House were delivered to the William S. Clark.

All of the testimony of C. A. Wirth, G. Wallace

Ryuerson, H. W. Bradway and Almo G. Abell relating to the quality and condition of eggs on board the William S. Clark in the month of November, 1943 (eggs delivered to the ship around the 18th of October, 1943), or subsequent to their removal therefrom.

Said motion will be made upon all the grounds indicated with respect to the witness, Debes. [3085]

All of the testimony of the witness, Frank Gartenberg, in respect to the warehousing and storage of eggs in the Terminal Warehouse Company in Los Angeles, and all opinions and conclusions expressed by witness Gartenberg as to the quality of eggs on board the William S. Clark.

Said motion will be made upon all of the grounds set forth in respect to the witness, Debes, and upon the ground that no foundation was laid that eggs contained in cases in the Terminal Refrigerating Company are the eggs that were placed aboard the William S. Clark.

Next the testimony of the witness August Hanson, foreman of the shore gang, employed by the American Steamship Company in connection with the loading of a ship called the Czechoslovakia Victory, with reference to all of his testimony in connection with said loading. The said motion will be made upon all the grounds indicated in the motion with reference to the witness Henry Pineda, and particularly upon the ground that the testimony of the witness August Hanson is not connected with any subsequent testimony introduced in the case and has no relation or bearing and is not connected

with the conspiracy count or any of the substantive counts alleged in the indictment.

Next, all the testimony of the witness Moran Amundsen, steward of the steamship Josiah Royce, with reference to the quality, size and condition of the eggs and the condition and [3086] temperature of the chill box on that ship. That motion will be based and made on all the grounds indicated in the written motion with reference to the witness Henry Pineda.

Next, all of the testimony of Neldon James Van Winkle, chief steward of the Henry White, relative to the condition of eggs aboard the Henry White during its voyage and subsequent to delivery, namely, about the middle of May (delivery May 1st).

Said motion will be made upon all of the grounds set forth in respect to witness Debes.

The testimony of William J. Cochrane in which he expressed the opinion that the eggs he examined on the Gilbert Hitchcock were small Grade A. (80 cases found, all of the same label; only 55 delivered under the evidence in this case.)

Said motion will be made upon all the grounds set forth in respect to witness Debes.

The testimony of the witness, Edward Fisher, wherein he expresses an opinion as to the size of the eggs involved on the Gilbert Hitchcock.

Said motion will be made upon all of the grounds set forth in respect to witness Debes.

All of the testimony of Oscar Nystrom relative to the delivery of eggs aboard various vessels from

the plant of Nye & Nissen, which said deliveries have been identified in the record; all evidence of said witness relating to deliveries [3087] to vessels at Pier 34 where the time and place and persons involved have not been identified in the record.

Said motion will be made upon the ground that no foundation has been laid for the introduction of said evidence against this defendant in that this defendant had not participation of any kind, character or description in the matters testified to by the witness, Nystrom.

All of the testimony of witness Milton R. Evans wherein he expresses an opinion as to the quality of eggs subsequent to delivery and acceptance of same by the vendee.

Said motion will be made upon all of the grounds indicated with respect to the witness, Debes.

Next, all the testimony of the witness Floyd Mencimer, with relation to a certain incident pertaining to a delivery of butter in the month of August, 1943, said motion being made upon all the grounds heretofore indicated in the written motion with reference to the witness Henry Pineda.

Next, all evidence and all testimony of the witness Josephine Bryant, dealing with certain transactions and occurrences pertaining to eggs in the year 1940, said motion being made and will be made upon all the grounds heretofore indicated in the written motion with respect to the witness, Henry Pineda.

Next, all testimony of the witness, Adam Thomas Andrade, in which eggs are involved, and all testi-

mony of said witness [3088] pertaining to a certain delivery of 749 cases of eggs in the middle of the year 1938 to the transport docks at Fort Mason. And further, all testimony of said witness pertaining to the delivery and the alleged reoffering of a certain lot of 35 to 65 cases in the Presidio in the middle of 1939; and further, all testimony of said witness pertaining to the delivery and reoffering of a certain lot of eggs allegedly rejected by one Colonel Kielsmeier; and further, all testimony of said witness relating to the use of a stamp allegedly referred to as a counterfeit stamp; and further, all testimony in which he uses the word "counterfeit"; and further, the testimony of said witness referring to a certain lot of eggs consisting of 1,000 cases of eggs allegedly delivered to the Navy at Pier 56 in San Francisco in the latter part of 1939; and further, and lastly, all testimony of said witness pertaining to the delivery of 500 cases for the Navy in the year 1940.

With respect to the general grounds herein referred to in the making of this motion as being indicated that general grounds would be named or referred to or indicated to the Court, as to each and all of the witnesses against whose testimony the motion to strike is made, the defendants and each of them, speaking jointly and severally, as indicated at the inception of the motion, refers to each and all of the general grounds which are embraced in the written motion with respect to the witness Henry Pineda and with respect particularly to [3089] the motion to strike the testimony of the witness Adam

Thomas Andrade, the motions will be based upon all the grounds indicated in the written motion to strike the testimony of the witness Henry Pineda.

Mr. Faulkner: Mr. Pratt, is that agreeable to you, that we refer to the grounds without reading them into the record?

Mr. Pratt: That is all right with me.

Mr. Faulkner: Is that all right with the Court? Your Honor will recall that we filed a written motion after one of our legal discusssions with respect to the witness Pineda. Counsel for the Government has a copy and the Court has the original. If it is agreeable with your Honor we are content to refer to them as a paper filed in the cause; but if your Honor desires the record to identify it, we will read it.

The Court: I think you are limited at this time to your motions. If you have exhausted your motions we can use the afternoon for argument, if you wish.

Mr. Faulkner: No, your Honor. In Mr. Sullivan's motion he stated as part of the grounds of the motion which is to be made in the presence of the Jury certain grounds that are incorporated in a *written on* file. That is an agreeable reference as far as the Government is concerned, and I was inquiring whether that was agreeable to your Honor.

The Court: If the Government stipulates to that.

Mr. Faulkner: That is agreeable to the Government. [3090]

Mr. Pratt: I have no objection to waiving anything in connection with this motion.

Mr. Faulkner: Thank you.

At the conclusion of the Government's case, your Honor, the defendants in the above-entitled action, Nye & Nissen, a corporation, Abraham Moncharsh, Henry Eugene Berman, Ruby Jutland Goddard, and Edward LeRoy Menges, each severally move the above-entitled Court for an order dismissing the charge contained in Count 1 of the indictment in the above-entitled action or for an order directing a verdict of not guilty in respect to said Count 1 in the manner following and upon the following grounds:

1. That the motion, the grounds for the motion and any argument that may be addressed to the Court in respect to the motion is made in behalf of each defendant, individually, including the corporate defendant, as though each defendant separately and distinctly and by himself were presenting this motion, and without respect to any other defendant in the case, and is made in this form only in the interest of time and to avoid a separate motion being made on behalf of each individual defendant.

2. That the evidence is insufficient as a matter of law to justify or sustain a verdict of guilty.

3. That the evidence is insufficient to establish a conspiracy to defraud the United States. [3091]

4. That the evidence is insufficient to establish a violation of Section 88, Title 18, USCA.

5. That the evidence received in connection with

said Count 1 is as consistent with the innocence of this defendant as with his guilt.

6. That Count 1 in the indictment herein contained fails to state facts sufficient to constitute a violation of Section 88, Title 18, USCA.

As a ground for said motion and as part of said motion, this defendant moves and specifies:

(A.) That the corpus delicti of the offense attempted to be charged in Count 1 of said indictment has not been established.

(B.) That the evidence is insufficient to show knowledge of any conspiracy on the part of this defendant.

(C.) That the evidence in this case is insufficient to show participation in said conspiracy with knowledge on the part of this defendant of its existence.

(D.) That there is a fatal variation between the proof and the charge in this: That there is no proof of a continuing conspiracy commencing on January 1, 1938, and continuing up to and including January 1, 1945 or thereafter.

(E.) That there is no connection between the acts, circumstances and events testified to by the witness Pineda and/or Andrade, all of which terminated in 1942, and acts or [3092] transactions thereafter as follows: One incident in the fall of 1943 (October), and a series of incidents in the months of May and April of 1944, and an incident occurring in December of 1944.

(F.) That there is a fatal variance in the proof ing in 1943 and 1944 are unrelated and uncon- offered in this case in that the transactions occur-

ring in 1943 and 1944 are unrelated and unconnected, both as to type and as to persons involved, with the transactions testified to by the witness Pineda and/or Andrade.

(G.) That there is a fatal variance in the proof offered in that none of the proof offered which may be designated as the testimony of the witness Pineda, and/or Andrade are connected or related to the transaction occurring in April and May, 1942.

(H.) That there is a fatal variance in the proof offered in that the transactions referred to by Colonel Hand as having occurred in San Francisco Presidio in the year 1941 are unconnected and unrelated as to type and person or persons involved, with transactions testified to by either the witness Pineda or the series of events occurring in 1943 and 1944.

The defendants in the above-entitled action, Nye & Nissen, a corporation, Abraham Moncharsh, Henry Eugene Berman, Ruby Jutland Goddard and Edward LeRoy Menges, each severally move the above-entitled Court for an order dismissing the charge contained in Count 2 of the indictment in the above-entitled [3093] action or for an order directing a verdict of not guilty in respect to said Count 2 in the manner following and upon the following grounds:

1. That the motion, the grounds for the motion and any argument that may be addressed to the Court in respect to the motion is made in behalf of each defendant, individually, including the corporate defendant, as though each defendant separately and distinctly and by himself were present-

ing this motion and without respect to any other defendant in the case, and is made in this form only in the interest of time and to avoid a separate motion being made on behalf of each individual defendant.

2. That the evidence is insufficient as a matter of law to justify or sustain a verdict of guilty.

3. That the evidence is insufficient as a matter of law to sustain or show a violation of Section 80, Title 18, USCA.

4. That the evidence is insufficient to sustain a finding that this defendant did any act or thing with intent to defraud the United States.

5. That Count 2 set forth in the indictment in this case fails to state facts sufficient to constitute a violation of Section 80, Title 18, USCA.

6. That the evidence in respect to Count 2 in this indictment is as consistent with the innocence of this defendant as with his guilt. [3094]

7. That the evidence fails to disclose that this defendant either prepared false claims, had knowledge that a claim had been prepared, had knowledge that merchandise was assembled and delivered, or participated in either the assembly or delivery or preparation of any claim against the United States Government or an officer thereof, or any department thereof, or any corporation in which the United States was a stockholder, or that the claim was presented for payment or approval to or by any person or officer in the civil, military or naval service of the United States.

8. There is no evidence that any claim relating

in any manner to Count 2 in the indictment was known by this defendant to be false, fictitious or fraudulent.

9. That there is no evidence that this defendant knowingly and wilfully did falsify or conceal or cover up by any trick, scheme or device, a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any statement, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement, or in any matter within the jurisdiction of any department or agency of the United States or any corporation in which the United States of America was a stockholder.

That each defendant moves for an order dismissing Count 3 [3095] of said indictment or for an order directing a verdict of acquittal in respect to Count 3 in the identical form as each defendant moved for a similar order in respect to Count 2, with the sole exception that the words "Count 3 of said indictment" shall be inserted in lieu of the phrase "Count 2 of said indictment". In other words, each defendant repeats into this record his motion to dismiss or for a directed verdict as to Count 3 in the form and words set forth in the motion in respect to Count 2, except in the particulars just specified.

I think that would specify the matter, do you not, your Honor? In other words, instead of read-

ing the motion for the first substantive count, we adopt the identical words.

The Court: That gives you a record on each count.

Mr. Sullivan: That each defendant moves for an order dismissing Count 4 of said indictment or for an order directing a verdict of acquittal in respect to Count 4 in the identical form as each defendant moved for a similar order in respect to Count 2, with the sole exception that the words "Count 4 of said indictment" shall be inserted in lieu of the phrase "Count 2 of said indictment." In other words, each defendant repeats into this record his motion to dismiss or for a directed verdict as to Count 4 in the form and words set forth in the motion in respect to Count 2, except in the particulars just specified. [3096]

That each defendant moves for an order dismissing Count 5 of said indictment or for an order directing a verdict of acquittal in respect to Count 5 in the identical form as each defendant moved for a similar order in respect to Count 2, with the sole exception that the words "Count 5 of said indictment" shall be inserted in lieu of the phrase "Count 2 of said indictment." In other words, each defendant repeats into this record his motion to dismiss or for a directed verdict as to Count 5 in the form and words set forth in the motion in respect to Count 2, except in the particulars just specified.

That each defendant moves for an order dismissing Count 6 of said indictment or for an order directing a verdict of acquittal in respect to Count 6

in the identical form as each defendant moved for a similar order in respect to Count 2, with the sole exception that the words "Count 6 of said indictment" shall be inserted in lieu of the phrase "Count 2 of said indictment." In other words, each defendant repeats into this record his motion to dismiss or for a directed verdict as to Count 6 in the form and words set forth in the motion in respect to Count 2, except in the particulars just specified.

That each defendant moves for an order dismissing Count 7 of said indictment or for an order directing a verdict of acquittal in respect to Count 7 in the identical form as each defendant moved for a similar order in respect to Count 2, with the sole exception that the words "Count 7 of said [3097] indictment" shall be inserted in lieu of the phrase "Count 2 of said indictment." In other words, each defendant repeats into this record his motion to dismiss or for a directed verdict as to Count 7 in the form and words set forth in the motion in respect to Count 2, except in the particulars just specified.

The Court: How much time do you wish for argument?

Mr. Faulkner: My wish would be to argue the matter until it is completed. To indicate how long that will be, it will take several hours, your Honor.

The Court: How many hours?

Mr. Faulkner: I would say three.

The Court: Will that be sufficient for the argument?

Mr. Plaft: You are referring to the entire argument, three hours?

Mr. Faulkner: I think it would take three hours for the defendants to clearly——

The Court: I had in mind convening at one o'clock and run for the remainder of the afternoon, and if necessary, if we could not complete this afternoon, I would call you back early tomorrow morning so both sides would have a full opportunity.

The Court: It is my purpose now to excuse the Jury until tomorrow morning at ten o'clock, at which time I think both sides will have had sufficient time for all purposes. [3098]

Mr. Faulkner: We may be able to shorten it.

The Court: Ladies and gentlemen, I am about to excuse you now until ten o'clock Wednesday morning, that it, tomorrow morning at ten o'clock. Before you leave I again desire to call your attention to the admonition heretofore given you. Keep that in mind and return at ten o'clock tomorrow morning. The jurors may be excused.

(Thereupon an adjournment was taken until tomorrow, Wednesday, March 20, 1946, at 10:00 o'clock A. M.) [3098-a]

Wednesday, March 20, 1946, 9:00 o'clock a.m.

(In the absence of the Jury, Counsel for the respective parties and the Court discussed the motions under consideration at the adjournment of court last evening, March 19, at the conclusion of which the Jury took their places in the Jury box and the following occurred:)

The Court: Call the roll of the jurors, Mr. Clerk.

(Roll called.)

The Clerk: All present, your Honor.

The Court: The motions that were addressed to the Court, namely, the motion for a directed verdict as to each of the defendants and as to each of the counts of the indictment will be denied. The motion to strike certain testimony and exhibits from the record will also be denied.

Mr. Faulkner: Exception.

The Court: You may proceed.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

Mr. Faulkner: If your Honor please, and ladies and gentlemen of the Jury, after you were empaneled as jurors in this case Mr. Pratt made what in the law is called an opening statement, and it is the province of the defendant at this time to make an opening statement. It is not an argument. It is not a plea on behalf of any defendant. Its single purpose [3099] when properly used is this: You

have had a trial that has lasted ten weeks. You will have a trial that will last some time longer. Witnesses come in. They are put on out of order. The sequence of their testimony at the time they are produced will be meaningless to you unless you have had outlined to you generally what the defendant intends to prove. So the purpose of this opening statement is so that you will know the significance of the testimony which comes through the lips of witnesses or from exhibits from time to time. Any comment that I make in the course of outlining this to you about anything that the Government has produced is unintentional. In other words, I want this to be unemotional. I want it to be as graphic as I can possibly make it with the hope in mind that it will be of some benefit to you ladies and gentlemen of the Jury in following the defense in this case.

Obviously, as a predicate or as a basis I think that it is proper to renew your recollection of the position of the defendants. We face a charge that is in an indictment and we face a defense to testimony. The indictment divides itself with some naturalness, as you may have observed in the development of the Government's case, into three categories. In other words, they charge in this indictment a continuing conspiracy between all of the men and the corporation with whom they are associated, commencing on the first day of January, 1938, and continuing until this indictment was returned. The [3100] original one I think was re-

turned in April and the amended indictment rendered before you some time in June or July.

The basis or gist of this indictment, in the fore part of it, relates to the transactions which we may identify in our minds, the transactions testified to by a man named Pineda and a man named Andrade. Now, one of those two men was their first witness, you might say, and one was their concluding witness. Their testimony related to a phase of the business of Nye & Nissen which might be described generally as business before the war. It was in the years 1938, 1939, 1940 and 1941, although Mr. Pineda remained there a short time later in the year 1942. During that period of time there has been brought to your attention testimony, and it is part of this charge, from which it would be expected by the Government that you would conclude, if you believe the testimony, that this firm was engaged in a business, that it, that there was a corrupt understanding between all of these people not to conduct a large business or a substantial business, but as part and parcel of that business, to unlawfully impede and impair and destroy through fraud of the United States Government the inspection service of the Department of Agriculture and of the Veterinary Corps. That is the charge and the testimony relates to the scraping of labels, it relates to taking eggs out of one case and putting them in another, it relates to a claim that a stamp was used in the absence of an inspector, [3101] and it relates to a claim that the firm of Nye & Nissen or these men who have been in

court daily with you had some schemes or pranks or tricks or devices that they would hand an inspector in the Army one case, let him look at it, take it away, and then turn the case around and hand him the same case to look at again. That is one phase of the case of the Government.

Then they have another phase. They say that that scheme or those devices or that criminal purpose which existed in the years when Pineda and Andrade were there continued on, and although there are several years in which there are no instances of anything, it will be their theory—it is their theory and it is part of the charge here that that criminal enterprise which came into being in January 1938 was still in existence in the year 1944, and that pursuant to this scheme, although it is unrelated in the record and in the testimony, pursuant to this criminal enterprise which commenced in January 1938, a series of loads of butter, eggs and cheese was sent by a man named Nystrom in the latter months of his employ, which lasted some considerable time, that this scheme was still in existence and they sent down from the 24th of April to the 3rd day of May, 1944, a series of orders, and that those orders were all filled pursuant to this scheme to defraud and deceive, these tricks and devices that had come into being in the year 1938. That is the second phase of the case.

Then comes a third phase of the case, which consists of the claim of the Government that these various invoices which have been presented to you from time to time, some of which I think you have

seen, but all of which you are familiar generally with the contents, all of those are invoiced by the firm of Nye & Nissen in which certain articles are described. They were presented to certain shipping companies, and certain monies were received. Now, those invoices it is claimed were wilfully and falsely prepared by each of the defendants in this case and that they prepared them with the knowledge that they were false when they were prepared, and that they were presented in each instance with an intent to deceive and defraud the United States Government out of money. That in substance is the subject matter of this trial and that is the subject matter, no matter how near the Government came—I am not commenting on that—that is the substance of the charge. That is what they have devoted some eight or nine weeks to attempting to prove.

Now, the defendants will prove—and by saying the defendants will prove I mean that when the case is concluded there will be established beyond any question or doubt certain fundamental things which are of essential importance. Now, the firm of Nye & Nissen, it will be established—and if I make this in narrative form I will ask you to assume from time to [3103] time that I say the proof will show this, but it will be shorter if I give you a narrative of what the evidence will be, and in that narrative I am saying to you that those are the things that we will establish from the witness stand. The firm of Nye & Nissen is one of the oldest egg packing companies in San Francisco. I

think that it goes back over fifty years. In the time that we are concerned with, from January, 1938, until, you might say, the present time, it operated a plant on Townsend Street which ran from Bluxome to Townsend right opposite where the trains come in. It moved from there in the year 1942 to a plant at 17th and Missouri Streets, a plant which has been characterized by Colonel Hand as one of the best plants of its kind. During this period of time it operated a business in Santa Cruz, in the State of Utah, in Petaluma, and it may have had one other plant. Now, I am directing your attention to the period of time that Mr. Pineda and Mr. Andrade were in the employ of the firm of Nye & Nissen. The situation at that time in respect to the business will be shown with considerably greater accuracy than I will indicate now, because I have not got the exact figures at this moment. But in the period prior to the war the firm of Nye & Nissen were doing a larger business in volume of butter and eggs than during the war time period. So that the evidence will clearly show that the business being done with the War Shipping of the Army was not any war baby as we [3104] ordinarily call it. In other words, it was part of the business, which, if there was any substantial change, it was less in the war time period than in the peace time period. But there was a marked difference in the method of doing business in those two periods.

The evidence will show, ladies and gentlemen, that in the year 1944, where I have the accurate

figures and you can compare these figures with the thought that I have just expressed, that the evidence will show that prior to 1944 the volume was greater—in the year 1944, the year in which there are some thirteen hundred cases of eggs involved in these transactions, the firm of Nye & Nissen sold to the United States Army alone in excess of two million dozen eggs. That is sixty-six thousand cases of eggs. In the year 1944, when these thirteen hundred cases of eggs which are the subject matter of this trial were delivered to the War Shipping Administration or their vessels, the firm of Nye & Nissen sold to the War Shipping Administration in excess of two million dozen eggs or in excess of sixty-six thousand cases of eggs in the year 1944, which would mean an average of nearly ten or eleven thousand cases of eggs a month that that company was selling to the Army and the vessels related to the War Shipping Administration, and what the volume of business for civilians like us was during that period I do not know, but we will have it. Now, during that period of time from 1938 until 1945, evidence has been introduced in this case that on a certain occasion on a vessel called the William Clark there was some butter and someone indicated that the butter was rancid. On another occasion a captain testified here that on a delivery of butter to the Presidio there was some fifty-six pounds of butter in cases that were marked 60 pounds. That is substantially all of the testimony that has been introduced thus far in relation to a delivery of butter. In the period of time that I have mentioned

you have to translate a single year's figure in order to get a grasp of the amount of butter that was being handled by Nye & Nissen during the entire period. In the year 1944 the Army received from Nye & Nissen two hundred and fifty-two thousand pounds of butter, and the War Shipping Administration received a like amount and, as a matter of fact, during the peace time, in the period of time when Andrade and Pineda were in the firm of Nye & Nissen in some form or another, that firm was handling I think somewhere near two hundred and fifty thousand pounds of butter a month, or ten thousand pounds of butter a day. So that that evidence will be introduced in order that you may grasp the significance and the background out of which these isolated transactions which have been from time to time presented to you by the Government have emerged.

One of the significant features of this case is this: You have had described to you by witnesses for the Government [3106] things that were done, such as switching eggs from one case to another, scraping labels, transferring eggs—I won't go into it—your memories are as good as mine. That evidence all comes from two men, Andrade and Pineda, so it is important for you to understand in a broad way at the beginning the method of doing business, and primarily the egg business, because that is really what we are concerned with here during that period.

Now, the State of California, in the years 1938 up until about the time of the outbreak of the war

was an exporter of eggs. By the State of California I mean the Pacific states. The egg producing communities in the west at that time produced enough eggs for local use with an over abundance for shipments east, and that was the type of business that the egg producer and the egg packer, such as Nye & Nissen, was engaged in until about the outbreak of the war or a little later, when that situation shifted and California for the first time became a substantial importer of eggs and various methods changed because of war conditions. Now, in the peace time period in which Andrade was the employee, one of the star witnesses for the Government, and Mr. Pineda, you have a different method of doing business than at a later time, and that method was not alone, the evidence will show, that of Nye & Nissen. It was a general method by egg packing plants. In other words, during the greater part of the year, we will [3107] say from January 15 until some time in September, all eggs produced were good eggs. I mean AA, A, Standards, Trade and all that—eighty-five per cent of all eggs produced that went into any packing plant were just as fine a quality of egg as you would find. They were all, you might say, good eggs. It was the practice during the period that is covered by the Andrade and Pineda testimony for Nye & Nissen and other companies to pack their eggs according to a label, and their method of handling their business was by references to labels, and their method was a blue pack meant the highest pack, the highest quality of an egg in the plant, whether it was a Nye

& Nissen, Poultry Producers, or a man back in Minnesota, New Orleans or Delaware. The blue pack was your premium egg. Then came your red pack, which was right close to it. It was next in order. And then I think there is a green and a black. Now, you have had explained to you certain standards of the Department of Agriculture. For instance, a AA egg, that is, a case of eggs in which 80 per cent of the eggs meet the requirements of a AA egg and 20 per cent graded out—I won't go into the details because you have seen them—20 per cent is graded out. A blue pack of eggs put out by a firm like Nye & Nissen, Poultry Producers, or any sound egg packing plant over the years was a better egg than a AA egg. It was a premium egg during most of the year. The red label egg would be an egg that would be somewhere in the neighborhood of a AA or an A [3108] egg, as we have had them referred to here in these standards. Or in the earlier period the Specials and the Extras.

Now, the result of that was this, that eggs would be packed in these packing plants, blue labels, red labels, green labels and black labels. They would come and be sold in many instances directly from those plants to various agencies, the Army and others. But we have not been concerned in this trial with the procedure in those plants. We have been concerned with the procedure on Townsend Street and the procedure on 17th and Missouri. Now, when those blue labels and red labels, green labels, and so on, would come into the plant of Nye & Nissen in peace time they were there for sale to

anybody. During that period of time—and the evidence will show this very important feature—the method of doing business with the Government, which subsequently changed, was substantially this: There was no War Shipping. You have in mind when Pineda and Andrade were there, there was no War Shipping business. There was, of course, business to the customers of Nye & Nissen which had been there for years and years—Matson, the American President Lines, and the old established companies with which you are familiar. Some of them required an inspection and some did not, but there was not what has been classified here as a War Shipping business in the years 1938, 1939, 1940 and 1941. But there was substantial Army business, and the way that that business was [3109] conducted was this: The Army would require a vast amount of eggs—I mean not vast in comparison to the volume of business that Nye & Nissen were doing, but vast in contrast to the five cases of eggs out on the Presidio, which are the only objectionable eggs ever delivered to the Army in this trial. The amount that they received was vast compared to that. And they would ask for bids. Now, when you would bid for a AA egg, which may at that time have been called a Special, and at the same time you would bid for an Extra egg, or an A egg, the difference in the price, which this record shows here under OPA—that was not the difference in price in peace time. The difference in price on bidding to the Army would usually run about a half a cent a dozen. So that in distinguishing the quality of

these eggs about which there has been so much said, you are distinguishing the quality of eggs which sold, we will say, the AA's sold for 15 cents a case higher than the A's. Now, the method that would be employed by the bidder in filling an order was this: The Army would want, we will say, ten thousand cases of A's or Extras. The firm of Nye & Nissen would put in a bid maybe for five thousand, twenty-five hundred, or some amount. They would bid a figure—not with these distinctions that the OPA created in later years—they would bid a figure to the Army depending on the type of egg that they had to give. In other words, if the bid came along in the spring where all eggs practically were AA eggs—I mean [3110] 85, 88, maybe 90 per cent—and they had all been in these blue packs and they would have maybe a relation of 80 per cent blue packs and 20 per cent red packs, the red pack will meet the army specification; so when they bid, they will bid a price to the Army which will fairly compensate them for the red pack plus the fact that they are giving them a higher quality of egg because that is all there is to give them out of the blue pack. So they fixed their own price, and if they got the bid, they filled the contract, and the record will show that they never failed to fill a contract that they took from the Army or anybody else. That was the method they did it.

The evidence will show that when the Army would come in to get their eggs, they would get in fulfillment of the order for Extras the type of eggs which the seller deemed fit that order, not knowing with

exactness how the order would grade, but knowing with more than normal accuracy the source of the eggs, the fundamental knowledge that comes with the egg business, that eggs basically are good when they are produced in a poultry producing area such as California, Utah—and like our Petaluma and Santa Cruz regions. Now, at that time sales to the Army were determined and paid for at the point of destination, and the Army was no more concerned with what Nye & Nissen thought about their eggs than you would before you ever heard of this case. They had no concern with that at all. [3111] They were only concerned with their own determination, and the record will show that there was a situation existing in those years which may be briefly described, so you will follow this testimony later, you have Army buying agencies on the one hand buying, we will say, standard eggs, which is the third grade egg, and you have on the inspectors on the other hand who were trying to get the best quality of eggs they could get for the Army. They had nothing to do with ordering what I might call in a relative sense poor eggs, and the Army were always trying to get a better grade than their buying department were buying. I do not mean that they bought exclusively standards, but practically all the orders for the posts and the men in this area bought, got, and were served standard eggs. They are not poor eggs. They are good eggs, but they are poor in the sense of comparison between the Standard or the Grade B egg and the AA. They would buy the Extras for certain over-

seas shipments, and they would buy specials under other circumstances. Now, the fulfillment of these orders with the Army would be done in the manner that was described by Colonel Hand in part, but there were instances and transactions concerning the Army where every phase of the packing, the processing and the wiring of the cases and the shipment of the cases was done completely under the complete supervision of the Army men and the Army employees right in the packing plant. Then in the plant on Seventeenth and Missouri or the other places there would be inspections of eggs, the evidence will show, and the eggs then would be inspected at the point of delivery, and it has always been a point of delivery inspection that determines whether or not the title to that property passed. Those eggs in the plant of Nye & Nissen always were the property of Nye & Nissen until the United States Army accepted delivery under a contract at the point of destination based upon inspection at destination. You have in mind that the evidence here that you have seen thus far is indicative after the quartermaster center was created after the commencement of the war, that inspection at point of origin as to quality and grade and inspection as to condition at the point of destination—that was not done when they were dealing on these bids. Inspection at the point of delivery was the final inspection.

Now, during this same period of time the evidence will show that the firm of Nye & Nissen did not sell to the United States Navy any Special

eggs. They did not sell to the United States Navy in 1939 or 1940 any eggs at all. They did not have in the desk of Mr. Goddard a purchase order to Nye & Nissen for the purchase of special eggs. They did not have a purchase order from the United States Navy for the purchase of a single solitary egg in the years 1938, 1939 and 1940, until sometime after the war started. But they did have, as the evidence will show, they did have and they did participate in the supplying to other egg producers of long standing, egg brokers and egg dealers, quantities of eggs which those dealers in turn delivered to the supply ships of the United States Navy. And we know—I will have the details later, but this is one of the later parts of the Government's case—I would like to give you the full details now so that you will grasp it as the fragments come in later, but substantially they did have orders from dealers which they knew were to fill a Navy contract, and the method of filling that Navy contract was substantially this: The eggs which Mr. Andrade referred to and described so minutely, if they were intended for a Navy order, they would have been wired on both ends. That is point 1. That is what the evidence will show. They never had an order for a thousand cases of eggs in the period that he mentioned. They did, however, have an order that you might say related to the indefinite period fixed by the Government. They had an order for 2000 cases of eggs, and I am quite sure that the evidence will show that that order followed the general pattern of filling that type of order.

It was entirely packed, inspected in the manner I will indicate in a moment, and wired in one of the packing plants, either Santa Cruz or Petaluma, which was the only place where they ever attempted to fill these orders in thousand-case lots. Those eggs under the method in existence in respect to inspection would be delivered where the [3114] firm of Nye & Nissen has an order which they know will go to the Navy—we will say for 2000 cases of eggs. The Navy contract with the dealer will have a provision in it with respect to inspection at point of delivery.

Now, here is the firm of Nye & Nissen. It assembled together a thousand, fifteen hundred, two thousand—sometimes the orders would go into five or six, ten thousand cases of eggs, and they sent them down to a pier and they are rejected. The evidence will show that to prevent situations of that kind, and as a courtesy to the vendor, and at the expense entirely of the vendor, so that they won't waste all that energy, they invite the Department of Agriculture into their plant and say, "We are going to fill an order of 2000 cases for the Navy. Will you look it over?" And the Department of Agriculture will examine those eggs, suggest something about the cases, and very seldom ever stamp them, but will indicate, "That looks like a good lot of eggs." They will inspect the eggs and indicate that it looks all right. Then when the eggs are delivered down at the pier, the Department of Agriculture inspects the eggs, and if the eggs pass the Navy buys them from the dealer in that period

of time. Now, that was the method in 1939 and 1940 for the sale and delivery of eggs to the United States Navy, and it is almost the same type of method that was used for the sale to the United States Army. In other words, the inspections in the plant of Nye & Nissen would be made so that at the point of delivery you would not go to all of the trouble to send these large amounts of eggs to particular points of destination and then have to bring them back. You would get an inspection in your plant. It was convenient to the vendor. It was convenient to the vendee. But the title to the eggs passed when the United States Army or the United States Navy inspected them at the point of delivery, and the evidence will show in relation to that type of inspection that no employee of any kind of the firm of Nye & Nissen ever participated, aided or assisted any of those men in the performance of their official duty, which is one of the charges in this indictment.

When the war came along, this quartermaster center became a buying—I may not be as accurate as I should be about some of these particular designations—but the quartermaster center I think took over the over-all buying of butter, eggs and cheese for the Army, and the method then was different. In other words, the buyer in that instance was trying to get all the merchandise available. In other words, the ordinary market that existed with a willing seller and a willing buyer, as we all know, did not exist during the war, and the army agencies were attempting to get vaster quantities, and I

think that they eliminated bidding. Now, I am not positive. The evidence will show that. But the evidence will show the destinction and also will show the type [3116] of contract under which you operated and will show how those contracts would be performed.

The War Shipping business came along in the years 1942 and 1943. At the time that that business came into existence the evidence will show that the firm of Nye & Nissen had had a similar business relation with the better known of the San Francisco steamship companies, like Matson, and American President Lines. Then came these other companies, and the vast quantities of shipping that was moving in and out of this port, and they became suppliers of eggs, butter and cheese in the year 1944—I think I gave you the figures—but the accurate figures will be produced from the witness stand—to various shipping companies who were or had some relation to the War Shipping Administration, and which we may designate here for all purposes, for clarity, the War Shipping orders. They came into existence. The transactions testified here in 1944 emerge out of a series of transactions which aggregated the sale of, say, sixty-five or seventy thousand cases of eggs in that single year, two or three hundred thousand pounds of butter and cheese—we will give you the accurate figure on the cheese, but I do not call it to mind at this moment. I know that the evidence will show, for instance, in this very period after Mr. Nystrom formed his contact with the FBI and up to the

time he left, in that period and for the plant of Nye & Nissen on Missouri [3117] Street, their new plant, something like thirty-five or thirty-six thousand cases of eggs moved in and out of that plant alone in that single month, the quantity of butter in that month I am not aware of, but I do not think there is any suggestion that any of the butter delivered during that period was not up to weight or up to quality or anything else.

Now, the matter of cheese has arisen in this case and there are a few things which it would be well for you to have in mind. In other words, cheese was a relatively unimportant and small phase of the business of Nye & Nissen. But a practice existed then and is continued today and is observed by all dealers in cheese. There is only one method of handling it. You handle it on the basis of the weights on your package. If it is marked as 25 pounds, you sell it as 25 pounds, The buyer always has the privilege of weighing it. He also has the right to a credit for any differences in weight or any deviations in weight. But the handlers of large quantities of merchandise such as Nye & Nissen and other firms, they handle goods and they pass the goods out of their warehouse and into the possession of the buyer upon things that are indicated on the face of the package in which it comes from the chief manufacturing companies.

Now, then, the relation that cheese has to this case—it has no relation to this first phase, as you know, so no evidence will be attempted to be produced on what they did in [3118] the matter of

cheese back in years where it had not arisen, but evidence will be introduced in this case with relation to this series of deliveries which are the subject matter, we might call them, of the substantive counts of the indictment. In other words, you will recall that a man named Nystrom gave testimony on the method of filling orders. Now, then, the manner in which those orders were filled will be just as completely, just as carefully, and just as accurately portrayed to you as it is possible for a person to describe how ten or twelve orders out of maybe fifty thousand orders filled in a year would be filled. But with the assistance of records and the fact that they are not quite as old as some of these transactions we are supposed to meet, an accurate clear picture will be presented, whether they did right or wrong, of the exact method of filling those orders by the men who handled them—I am addressing myself now to the evidence relating to filling the orders for the War Shipping Administration—to those ships which are referred to in the indictment, and than as a corollary of that you will all recall that the Government has had before you evidence of similar deliveries to ships that are not mentioned in the indictment. I can't take the detail I would like to. It would be unfair to my clients. I can't take the Cape Breton and the Cape so and so and so and outline to you every minute piece of testimony that we will introduce there. But I will state to you that accurate, [3119] complete evidence as to the manner of filling those orders, who they were done by, how they were done,

how, if there were mistakes made, how they were made or how they could have been handled, all will be presented to you in detail.

Ladies and gentlemen, I am not much on notes, and when I have them, I do not know how to use them, but I want to be sure that I have given you in connection with the switching of eggs, for instance, which has been referred to here, the buffing of cases, the changing of marks—you have had it described in a certain manner. There isn't any question in the world that the evidence will establish clearly and convincingly eggs were being switched in the plant of Nye & Nissen all the time. Marks were being crossed out of cases all the time. In other words, the evidence will show a picture substantially like this: You have in a plant a movement of thousands of cases of eggs out of your plant. You have, therefore, a movement of thousands of cases into your plant. You have the ever insistent cry on the part of the packing plants—Santa Cruz and Petaluma—for boxes, crates, wooden containers, to meet the requirements of those places. They come into your plant and they go out of your plant. How other companies did I do not know, but the evidence will establish that with respect to Nye & Nissen, the moment that eggs came into their plant at 17th and Missouri or Townsend Street, regardless of where they came from, unless they came from one of their [3120] own packing places and they knew the exact quality, the minute those eggs came into the plant they had them inspected.

The reason for that is this: When those eggs were inspected by the Department of Agriculture it established to the vendor, or, rather, to the owner, the quality of the eggs at that moment. It established a check upon the quality of eggs fixed by the packer, usually their own, but in many instances someone they were buying from. And third, it established a basis for filling orders. Now, you have had your mind focussed upon filling orders to the War Shipping Administration, the Veterinary Corps, and so on. The stamp of the Department of Agriculture was not a limited stamp in respect to anyone except Government agencies, and the date on the stamp of fourteen days for a cold storage egg and twenty-one days for a fresh egg was a rule and a regulation applicable to Government agencies, so that during this period of time the moment eggs would come in, as any careful business man would do, he would determine the quality then and get them stamped. Now, that stamp has no relation to anybody at that particular moment. Then an order comes in for the Government, some Government agency. Eggs that have a stamp that is within the period of limitation of the rules and regulations would be there ready to be tendered for delivery into a particular order. But any eggs could be tendered. They did not have to be the eggs that had been stamped. They could tender for inspection or [3121] delivery at point of destination any eggs that they had. But they would have those stamped eggs. Now, you have to visualize, and the evidence will show, a quantity of eggs that had

been stamped, we will say, this morning. Three weeks from now those eggs are taken out of that box and the box is used for another order because the eggs in that box, which are the only boxes available, do not meet the requirements of that particular purchaser. In other words, the stamp, if it is a Government agency, no longer is of any use, and here we have a thousand cases of eggs and the only boxes that you have on your floor that are going down to a ship. The eggs were stamped two weeks ago or three weeks ago. You can't tender those eggs. So you take those eggs out and you put other eggs in, and if the stamp is an old one, if you have the time, you run a crayon through it, and if you have more time you buff it off, and if you haven't any time at all you will leave it on, and cases of eggs were being used by every packing plant in California that had stamps of the Veterinary Corps and the Department of Agriculture, sometimes five and six stamps on one end of a case alone, and if you turned it all the way around, how many more you would find you would not know. Sometimes they would be all crossed out. Sometimes they would all be there fully, except as to the dates, as the day they were first put on there. So you have unquestionably, the evidence will show exactly when and how you would transfer [3122] eggs. It will show why you would use cases and why you would scrape labels. And it was done every day at the firm of Nye & Nissen. And unquestionably we will establish that that was the ordinary—I do not see how it could be otherwise—

the only ordinary, usable method under which a plant could operate.

Now, during this period of time, the evidence will show; if the firm of Nye & Nissen had, for instance, in their plant—I have to give you an illustration in order to outline what the evidence is so you will grasp the significance of it—has 2500 cases of eggs inspected by the Department of Agriculture today, five days from now or three days from now they wish to use those eggs to fill an Army order, and the evidence will show that in order that the Veterinary Corps of the United States Army is not prejudiced against those eggs, they have to remove the Department of Agriculture stamp because the Veterinary Corps had no use for, and paid no attention to a Departmetn of Agriculture stamp, and when eggs were tendered to them that had that stamp, they automatically took an adverse position and always tried to find a different finding as to their quality than their companion inspection service. And that was in existence during this period of time, and that was another reason why five hundred cases or two hundred cases would be tendered to the Department to the Veterinary Corps, which had just been inspected the day before, they [3123] would check those cases and remove every trace of a Department of Agriculture stamp, and tender them to the Vetinary Corps, in order that they would get a fair inspection.

We have had a great deal of testimony here about the inspection and grading of eggs. The evidence

introduced by the defendant upon the expert side will be this: the defendants will produce the egg expert for the firm of Nye & Nissen, who will describe his knowledge and experience in egg grading, the deterioration of eggs, and the problems of inspection, and describe to you the difficulties of fixing the grade of an egg by the method that has been described, and which is the only method, I guess, except the actual breaking of the egg, in a little greater detail. Our evidence will be of an informative nature so that you will have a clearer picture, much clearer than you could possibly have at this time, of how eggs are graded and how they are in reality inspected by the various departments.

One of the phases of this case—there is an incident here that requires some outline of testimony—concerned a ship named the William S. Clark. You will recall that that appeared to be just a typical instance that the Government was going to use, only the evidence disclosed that there had been some testimony given at a prior time, so that we found, and we will establish here to a greater extent, that the refrigeration on the William S. Clark was that type of [3124] refrigeration which caused mold and must to form on these eggs, and we will produce Mr. Brown's drawing that he made with the handwriting of Judge Goodell's on it to refute his claim that he never drew anything on the outside of the egg. In other words, he in another proceeding drew in the presence of Judge Goodell, and the drawing will have Judge Goodell's handwriting and will be identified by a reporter,

the exact drawing, showing where the fuzz was that accumulated on the eggs on the William S. Clark when it was in the ice box described by Mr. Brown here. Now, the evidence in relation to the William S. Clark will further show this: it will show that a quantity of eggs, of which the Government will make the claim, came out of a Terminal warehouse in Los Angeles and then were boldly delivered as fresh processed eggs to the William S. Clark. The evidence will show how the business is conducted and what the usual and ordinary operation of Nye & Nissen is when in October or the fall of the year eggs come in from the ice house. The evidence will also show how cases were disposed of.

In relation to that you will recall that that is one of the few instances in which Mr. Moncharsh, who is the president of Nye & Nissen, his name was mentioned. The evidence will show that he had no part in any way, shape, manner or form in the filling of that order, but that his intention was directed to that order—I think it was by the American President [3125] Lines—and they explained the deficiencies in the qualities of the merchandise, and the evidence will show that the firm of Nye & Nissen did what any reputable concern would do. They immediately replaced the merchandise. In the course of that replacing of the merchandise the evidence will show that the purchasing agent of the firm of the American President Lines met with Mr. Moncharsh in respect to the butter which was described here, and they both tested it, and they

both came to the same conclusion, expressed by one to the other, that the butter had all the flavor of the fruits and vegetables of the ice box in which it was, and there was nothing wrong with the quality of the butter at all. And Mr. Moncharsh said, "Well, what am I supposed to do? Am I supposed to pay for your butter?"

And the other man shrugged his shoulders and said, "All right, I will take the butter back." And he took the butter back. The evidence will show that Mr. Wirth, who testified here for the Government and went into this minute detail of how these cases were marked and everything else, stated his knowledge in an altogether different fashion when he prepared an affidavit and filed it in the State case. I could read that and go into the details, but I call your attention to the fact that we will establish the situation in respect to the William Clark, and we will establish in reference to that the inefficiency and the unfairness of a layman's testimony as to [3126] the quality of eggs. In other words, in relation to the testimony introduced by the Government on the William S. Clark that five out of every six eggs weren't any good, which was introduced here from some of these witnesses, the evidence will show that the maximum deficiency of those eggs was not fixed by the Department of Agriculture or anyone, but was fixed by the candlers in the Nye & Nissen plant, and they found the highest percentage of inedibles, and that percentage, I think, was one out of nine or one out of ten.

Now, on the subject of butter, the method of handling butter; the evidence will disclose that when an order would come in for butter to the firm of Nye & Nissen, the order of butter would be inspected, the details of which I won't go into now, but there would be first an inspection as to the quality of the butter. The butter would then be cut for an order of the United States Army, and in that butter room there remained all the time an inspector who had the privilege, and whose duty it was, and who always did every time the butter would come along the line, he would reach over whenever it pleased him to do so, but usually with uniformity which is established I think in the regulations, about every twentieth print, and weigh the butter. Now, that butter would vary in weight of necessity. But when the butter would be cased and delivered to the United States Army they would weigh it uniformly, just as that captain said, and if on an order of [3127] ten thousand pounds of butter they found a shortage of ten pounds as a result of their sample weighing, Nye & Nissen either changed the bill or were requested to give a credit for ten pounds of butter on a ten thousand pound order, for so many cents, and if the butter ran five hundred pounds over they never got a penny. That was the uniform method. That was the accepted method. It was understood between the seller and the buyer that at the point of destination the butter would be weighed. It would be weighed in the back room, the prints as they came off from time to time.

In respect to the transaction that the captain testified to, the evidence will establish that that butter that was cut in cubes, which is described here, was Minnesota butter. It was not cut by the firm of Nye & Nissen at all. It came into their plant and may have gone directly to the Presidio. If we can find the order it will be clearly defined to you, and if we can't find the order, if the records are gone, the method of doing business. In other words, when an order would come in, being contracted for by the firm of Nye & Nissen to be filled in respect to butter, maybe eighteen thousand pounds of butter to be delivered within a certain period, butter would come in from Minnesota, the eastern cut butter, which the cubes are—never cut by any plants in the west—they would never be unloaded even in the plant of Nye & Nissen, or if they were, it would only be for the purpose of loading them to a container [3128] that met the exact desires of the United States Army. Butter came in from Minnesota in 60-pound packages. It would automatically go to the Army with the labelling on it. It would meet the requirements of the United States Army or it would be repacked, sent out, and weighed by the United States Army.

During the course of this period, or in the course of the period that I have referred to, Mr. Sullivan calls attention to one of my notes with respect to the claim made that the firm of Nye & Nissen had a Department of Agriculture stamp. The evidence will prove positively that they never had a Department of Agriculture stamp at all, at any

time or any place, that was not delivered to an employee by a Department of Agriculture man to use while he was on the premises. During this whole period of time in 1938, 1939, 1940 and 1941, when the evidence will show the Department of Agriculture inspector inspected eggs in their plant, they were inspecting eggs in their plant practically every hour of the day. They had the complete run of the plant. They had the complete run of every phase of the plant. They came when they pleased, they left when they pleased. They came back when they pleased. They returned when they pleased. And during that period of time when they were inspecting eggs, when they had completed their inspection, sometimes the inspector would stamp the cases himself, but he would have all the cases put there, take the lids off, he would candle the eggs, and then he would say, [3129] "Stamp them up," and he would hand that stamp to anyone who was handy and tell him to stamp the quantity of eggs that was required in that order. The stamp would be returned to him, and that was done thousands of times.

Now, there would be no benefit to the firm of Nye & Nissen in the peace time where the inspections were at the point of delivery to put a phoney Department of Agriculture stamp on a case that was going to be inspected on a pier or on a ship or at some place that required Government inspection. Certainly they had vast quantities of eggs moving to Honolulu that would be inspected by the Department of Agriculture. They had quantities of eggs

that had no Government requirement of any kind, character or description to have a Department of Agriculture stamp on them. The evidence will show that there could be no point in deceiving yourself in respect to your own merchandise which you handle for yourself and in respect to the filling of orders, the Department of Agriculture stamp placed on the merchandise in their plant on Townsend Street had no beneficial effect whatever when the goods were inspected at the point of delivery. And what good the word "Specials" would do—for instance, the evidence will show if any one of you was an inspector, your stamp would be part of your every day life, and you would know its characteristics. You would know the color of the ink. And the evidence will show that if you took five hundred cases of eggs [3130] and put your own stamp on them and someone else had one that he had made for himself, the minute you saw the five hundred cases of eggs on the waterfront you would know that was not your stamp. You could not help knowing it. The stamp will be established as the creation of the imagination of someone who saw something who did not understand, and that will be established clearly and unequivocally with respect to a great quantity of this testimony. The evidence the defendants will introduce here will establish that people described in this courtroom physical things, some of which they never saw, and some of which they saw but did not understand. And when the case is complete —I assure you it will not take us nine weeks to put in our defense—when it is completed I believe

we will have gone further than is the burden of the defendants to merely stand mute, if they wish, and rely upon the requirement of the Government to establish their guilt beyond a reasonable doubt. I believe when this case goes to you, this fair Jury, that the evidence of the defendants will have affirmatively established the burden, have established in their own behalf—and not created a doubt—but established beyond any question in the mind of a fair juror that they were not conspiring together for a period of eight years to defraud the Government. That they were not conspiring together for a period of eight years in order that they could consummate that great criminal conspiracy by the delivery of fourteen orders [3131] of eggs in the year 1944, and that not a single claim that is in evidence here was ever presented with the intent to defraud the United States with the knowledge on the part of the party who prepared it that it was false, fraudulent, fictitious, and that it was prepared for the purpose of obtaining money from the United States Government. The evidence will establish the minuteness of these transactions during a period of time when you are dealing with the United States Government who, by one act of theirs, took from the pockets of Nye & Nissen $48,000 by giving them a commandeer order, commandeering all the eggs they had in cold storage, practically all of them, and buying them at the then market, when they were being held—thousands of dollars invested in them—to be sold at 16 and 18 cents higher, which is part of the egg business—and the Government

comes along and takes all of them during this period, twelve thousand cases, with a loss of $36,000 right in this period. In other words, anything the Government wanted, the evidence will establish, they got, and they got it just as freely and fairly, they got it in service, they got it in merchandise, and they got it in the labor of every man in that firm during the entire period they asked for it, and they are still getting that service today, and they are still supplying in substantial quantities the United States Army with eggs.

From those facts we will ask the Jury, consonant with [3132] their duty, to return a verdict as to each defendant on every count in this case of not guilty. [3132-a]

Mr. Faulkner: May we have the blackboard brought over, your Honor?

The Court: Very well.

Mr. Sullivan: The defense will call Mr. Berman, if the Court please.

HENRY EUGENE BERMAN,

called as witness for Defendants; sworn.

The Clerk: Q. Will you state your name?

A. Henry Eugene Berman.

Direct Examination

Mr. Sullivan: Q. Mr. Berman, where do you live, please?

A. I reside at 824 Twenty-sixth Avenue, San Francisco.

(Testimony of Henry Eugene Berman.)

Q. What is your present occupation?

A. At present I am city sales manager for Nye & Nissen, Inc.

Q. And that is one of the defendants in this case? A. Yes, sir.

Q. And you are one of the defendants in this case, is that correct? A. Yes, sir.

Q. By the way, are you related to any of the other defendants in the case?

A. Yes, sir, I am related to two defendants in the case.

Q. Who is the first defendant?

A. I am related to Mr. Moncharsh.

Q. And the second defendant?

A. Mr. Goddard.

Q. How are you related to Mr. Moncharsh? Just so the jury [3133] can get the picture here.

A. Mr. Moncharsh and I married sisters.

Q. So you are really not a blood relative of his?

A. No, I am not. As a matter of fact, it was through my employment in Nye & Nissen that I became acquainted with my wife, who at that time was working for Nye & Nissen, also.

Q. I was going to ask you if you were married, so that removes the necessity.

A. Yes, I am married and have two children.

Q. What is your relationship with Mr. Goddard?

A. Mr. Goddard is my wife's brother and Mr. Moncharsh's wife's brother, naturally.

(Testimony of Henry Eugene Berman.)

Q. Did you work for Nye & Nissen in the year 1938?

A. As a matter of fact, I was employed by the Coast Egg Corporation in the year 1938.

The Court: Q. By whom?

A. The Coast Egg Products Corporation.

Q. Who is the Coast Egg Products Corporation?

A. The Coast Egg Products Corporation was a partially-owned subsidiary of Nye & Nissen.

Mr. Sullivan: Q. What products did the Coast Egg Products Corporation handle?

A. The Coast Egg Products Corporation handled eggs, butter and cheese. They were originally formed for the purpose of selling eggs to the bakers, both in the shell form and in the broken-out form, which is commonly known as canned eggs.

Q. Is there a common name, too, for eggs which are not sold in the shell form? Is there some particular name when they are sold in cans?

A. Well, there are whites, yolks, and whole eggs, three different classifications.

Q. You were not an employee, technically speaking, of Nye & Nissen in the year 1938, is that correct? A. Technically I was not.

Q. Technically, you were an employee of Coast Egg Products Corporation in that year, is that correct? A. In 1938, yes.

Q. For how long did you remain in the employ of the Coast Egg Products Corporation?

A. As a matter of fact, I was an employee of the Coast Egg Products Corporation up to its dis-

(Testimony of Henry Eugene Berman.)

solution, which took place, I believe, on December 31, 1943.

Q. When you were an employee for Coast Egg Products Corporation during the years, say, 1938, 1939, 1940, 1941 and 1942, were you down at the plant of Nye & Nissen, on Townsend Street?

A. Yes, that was my headquarters.

Q. Your headquarters were at 324 Townsend Street? A. Yes.

Q. And you have just mentioned to us, Mr. Berman, that you were an employee of this Coast Egg Products Corporation until its dissolution on December 31, 1943. Did that place you or place your position of employment at the plant of Nye & Nissen on Seventeenth and Missouri for a portion of the time? A. Yes.

Q. When you were an employee, or when you were in charge of the [3135] Coast Egg Products, do I understand you to say that you were in charge of Coast Egg Products Corporation? Were you manager, or what was your position?

A. Yes. As a matter of fact, for I think a year or more before its dissolution, I was the president of the Coast Egg Products Corporation.

Q. When you were down on Townsend Street, and when the Coast Egg Products Corporation was located on Townsend Street, did you have any other employees of Coast Egg Products underneath you? A. Yes, I did.

Q. What type of employee would you have?

A. Retail delivery salesmen.

(Testimony of Henry Eugene Berman.)

Q. What, generally, did they do?

A. They sold eggs, butter and cheese to the retail stores, the bakeries, hotels and restaurants.

Q. After your place of business was moved along with Nye & Nissen's out to Townsend and Missouri, did the same substantial method of distribution of eggs by Coast Egg Products prevail?

A. Yes, there was no change.

Q. You used the same trucks, did you?

A. Well, at or about that time we bought new trucks. Prior to that time the same system was prevalent.

Q. When you were down at Townsend Street, Mr. Berman, during the years from 1938—let us take up until the war began—what, generally, was your representative business day down there? What did you do generally?

A. Well, I was outside [3136] all the time. I checked my trucks out in the morning and I checked them in at night, and for the balance of the day I was out either soliciting business or collecting for merchandise that had already been sold, or I was checking on the drivers to see that they were keeping their routes in good order.

Q. Your immediate place of busines, though, was it in the plant proper of Nye & Nissen on Townsend Street, or was it in some separate section of it?

A. Well, it was in the plant proper at Townsend Street.

Q. And during the time that you were on

(Testimony of Henry Eugene Berman.)

Townsend Street in the plant in the capacity that you have just described, did you have an opportunity to examine the movement of eggs in and out of the plant on occasions?

A. Yes, I did.

Q. Can you state whether there was a continuous movement of eggs in and out of that plant during that time?

A. There most certainly was, and in great quantities.

Q. At that time, as I understand it, you were interested, or the functions of your particular position were more confined to retail distribution, is that correct? A. Exclusively.

Q. And retail distribution of the type that you just mentioned to the ladies and gentlemen of the jury. A. That is right.

Q. During that time, when Coast Egg Products were located down on Townsend Street, in the Nye & Nissen plant, did you [3137] have occasion to make, or did your department have occasion to make what are commonly refererd to as War Shipping Administration sales?

A. No. As a matter of fact, if I may interrupt, the War Shipping Administration did not come into being until the advent of the present war in 1942, and at that time we were at 17th and Missouri Streets.

Q. I will refresh your recollection just a little bit. Let us take Pearl Harbor, December 7, 1941, as, at any rate, from the practical layman's point

(Testimony of Henry Eugene Berman.)

of view, the beginning of the war. At that time was the Coast Egg Products Company located on Townsend Street?

A. No, at the beginning of the war, yes—as a matter of fact, we were on Townsend Street at the beginning of the war.

Mr. Faulkner: Your Honor, may I interrupt? We tried to get another blackboard and could not. We were going to try to use this. But now the Marshal has one right out your Honor's door. May we have that brought in so that we won't have to erase any of this?

The Court: Very well.

Mr. Sullivan: Q. I was asking you, Mr. Berman, about a transaction or the transactions of the Coast Egg Products Corporation with War Shipping Administration, and I directed your attention to a point, namely, the date of Pearl Harbor on December 7, 1941. I now ask you if at that date the Coast Egg Products Corporation began to receive War Shipping Administration [3138] orders to fill?

A. Yes, we did.

Q. Are you able to place at this time with any exactness when these purchase orders begin to come into Coast Egg Products?

A. Well, to the best of my recollection, it was sometime in 1943.

Q. In other words, it is your recollection that during, for instance, the calendar year 1942, which was the year immediately after the outbreak of the

(Testimony of Henry Eugene Berman.)

war, it is your recollection that there were no War Shipping Administration orders; is that correct?

A. At the present time that is the best—

Q. Let me ask you this question: In 1943 was there any direct cleavage after which War Shipping Administration orders flooded in on you, or did they come in gradually?

A. At first they came in gradually.

Q. How was your business with them built up, was it built up with any suddenness or was it built up gradually? I am speaking with respect to the volume of the War Shipping Administration orders.

A. No. The volume was built up with suddenness, I would say; a few accounts trickled in and then they just began piling up.

Q. So, if I understand your testimony, in February, 1943, the War Shipping Administration orders began to come in, is that correct?

A. That is right.

Q. Thereafter the orders are handled by Coast Egg Products, are they?

A. The orders that were handled by Coast Egg [3139] Products Corporation at that time were the ones that came in as a result of having been solicited by myself prior to that time, or where I had received an account and they had passed the word on to somebody else that Nye & Nissen was taking care of the business of Coast Egg Products. When I say Nye & Nissen, let me clear that up in one point, if I may; we not only used the facilities of

(Testimony of Henry Eugene Berman.)

Nye & Nissen, Inc., at that time, but we also used the stationery of Nye & Nissen at that time, so that any bills that went out would have read "Nye & Nissen, Inc.," rather than "Coast Egg Products, Inc."

Q. All right. Primarily, your activities before the war were those of a salesman, is that correct?

A. Exactly.

Q. Was it a result of these that your first War Shipping Administration orders came in from your old clients? A. That is right.

Q. I think you have told us that the Coast Egg Products Corporation was dissolved in December, or on December 31, 1943. A. That's right.

Q. Then what became of you as an employee?

A. I became city sales manager for Nye & Nissen, Inc.

Q. At the time that this change was made on December 31, 1943, where were you working?

A. We were at Seventeenth and Missouri Streets at that time.

Q. At that time how long had you been out there before the change was made in your employee status from an employee of [3140] Coast Egg Products to one of the city sales manager of Nye & Nissen?

A. We moved to Seventeenth and Missouri Streets in the early fall of 1942, so I would have been there for a period of approximately 15 or 16 months.

(Testimony of Henry Eugene Berman.)

Q. Then beginning on January 1, 1944, you were an employee of Nye & Nissen, were you?

A. That's right.

Q. Have you remained such to this day?

A. I have.

Q. Are you familiar with the general layout and general floor plan of the old Nye & Nissen plant on Townsend Street?

A. Yes, I would say that I am.

Q. Would you mind coming down to the board, Mr. Berman?

The Court: I might suggest that at the recess, with the consent of both sides, you agree upon a diagram, if you wish.

Mr. Sullivan: I think we can do that, your Honor.

The Court: Then we will save some time in that connection.

Mr. Sullivan: Q. I want to show you first, Mr. Berman, the diagram that appears here on the blackboard and purports to be a drawing by chalk made by the witness Henry Pineda on behalf of the Government as an illustration of some of his testimony at the beginning of the trial. I will ask you, you have seen that drawing here in court previously, haven't you? A. Yes.

Q. Mr. Berman, would you say that generally speaking—I am not asking you for any meticulousness—generally speaking [3141] would you say that the floor plan there is represented accurately?

(Testimony of Henry Eugene Berman.)

A. It is accurate in every respect with the exception of the proportions.

Q. When you say that it is accurate in every respect with the exception of the proportions, what do you mean?

A. I mean that everything is in its place as actually existing on Townsend street, the candling room, the freezers, the butter room, those were the actual positions in the plant at that time.

Q. When you say that it is out of proportion—did you say it was out of proportion?

A. I did.

Q. Were those your words? When you say it is out of proportion, can you state to the ladies and gentlemen of the jury from your knowledge and familiarity with that plant what the proper proportion was with reference to a relationship between the width and length of that plant? What is the proper proportion of that plant on Townsend Street?

A. The proportion of that plant on Townsend Street was more than five times as long as it was wide.

Q. Do you know from your own knowledge, Mr. Berman, approximately, what the overall ground floor dimensions, width and length of that plant were during the years 1938 until 1942, when Nye & Nissen moved from this place?

A. To the knowledge I have before, the dimensions were approximately 50 feet wide by 290 feet long. [3142]

(Testimony of Henry Eugene Berman.)

Q. Did that plant extend from Townsend street directly back to another public thoroughfare known as Bluxome Street? A. Yes.

Q. Is that correct? A. Yes.

Q. I notice on this drawing, for instance, Mr. Pineda has indicated by the word "Entrance," he has put "Entrance" up here just beneath where he has written "Townsend Street." Are you familiar with the way the entrance was constructed of that plant on Townsend Street? A. Yes, sir.

Q. Will you tell the ladies and gentlemen of the jury in your own language just how the entrance was constructed, and what it was like on Townsend Street? A. May I have the pointer?

Q Yes.

A. I may be able to do it better. This line on Townsend Street was the property line of the front of our building, and the entrance consisted of a recess into the plant proper of about 20 feet in depth, so that when a truck backed in at street level into our plant this loading platform, here, would be at truck level, and we could walk in and out of our trucks at will, so that actually the floor of that plant on Townsend Street was about 20 foot back from Townsend Street, itself.

Q. So that when we look at that portion of this diagram of Mr. Pineda, which is labeled in chalk, "Goddard's Office," would you say that, relatively speaking with respect to the front of the plant, having in mind your testimony as to the [3143]

(Testimony of Henry Eugene Berman.)

recess, as you call it, would you say that it was the correct relative position of that office?

A. No, it could not be.

Q. I will ask you, Mr. Berman, if you can give us an estimate—I am only asking you for an estimate—how far would you say Mr. Goddard's office was, the first portion of it, from the end of the loading platform, or the end of the recess to the first part? A. At least ten feet.

Q. Would that mean, then, Mr. Berman, that the first part of Mr. Goddard's office was approximately 30 feet from the building line?

A. I would say so.

Q. Having in mind there was a recess of 20 feet. A. That is correct.

Q. Then from Mr. Godard's office to the rear of the building—I will withdraw that.

Mr. Berman, from Mr. Goddard's office to a portion of the premises designated by the witness Pineda as "Breaking room," and mentioned by him as one of the common working places, having in mind the diagonal direction, what would you estimate the distance was?

A. It would be well over 200 feet.

Q. Would you mind resuming the stand?

A. Not at all.

Mr. Sullivan: I might say in this connection, your Honor, that I have several other phases of the dimensions of this plant to develop, but with your Honor's suggestion I feel that we can do it very conveniently by agreeing on a diagram. [3144]

(Testimony of Henry Eugene Berman.)

The Court: Well, it is nearly time for adjournment, and there are some other matters I want to take up. I will excuse the jury at this time. The jurors may be excused, to return at 2:00 o'clock this afternoon.

(The jurors retired from the courtroom.)

The Court: In the interest of time, all of you may be excused and you can return before two, at 1:30, and arrange the diagram so you don't need to consume the time when the jury will come back.

Mr. Sullivan: Suppose we be here, Mr. Pratt, at twenty to two?

Mr. Pratt: Yes.

The Court: You may be excused.

(A recess was taken until 2:00 o'clock p.m.)

Afternoon Session, March 20, 1946, 2 p.m.

The Clerk: United States vs. Nye & Nissen.

The Court: Do you waive the roll call, stipulating and agreeing all the jurors are seated in the box. Proceed.

HENRY E. BERMAN

recalled;

Direct Examination (resumed)

Mr. Sullivan: May I proceed now, your Honor?

The Court: You may proceed.

Mr. Sullivan: If the Court please, during the

(Testimony of Henry Eugene Berman.)

noon recess and upon your Honor's suggestion the witness Henry Berman drew on the second blackboard here a diagram showing the approximate floor plan and distribution of area in the Townsend Street plant of Nye & Nissen during the time that he testified he was there at the plant, and he also drew to the left of it the smaller diagram indicating the mezzanine floor of that plant, and upon your Honor's suggestion I called that to the attention of Mr. Pratt and I will now ask them, Counsel for the Government, Mr. Pratt, if it will be stipulated that this diagram may be used in this case and may be referred to by the witness as an illustration in connection with his testimony with the same full force and effect as if it had been completed and written during the session of the Court and in [3146] the presence of the Jury and the Court.

Mr. Pratt: The Government has no objection to the use of this chart in any proper manner subject to any correction.

Mr. Sullivan: Yes, subject to correction.

Mr Pratt: During the course of the trial.

Mr. Sullivan: Then, I understand that is stipulated.

Mr. Pratt: Yes, certainly.

Mr. Sullivan: Thank you.

A. Now, Mr. Berman, would you come down here again to this blackboard. I might say, your Honor, that in presenting this evidence we are presenting the—the illustration, rather, we are doing it as a fair approximation, what we consider a

(Testimony of Henry Eugene Berman.)

fair approximation in distances and the allocation of the area and with the purpose in mind, as Mr. Pratt has suggested here, if there are any corrections, if we catch them they may be corrected. We hoped to have more exact details of the dimensions, but it is our particular purpose at this time that that is a fair approximation, a fair approximate illustration.

The Court: Who draw the document?

Mr. Sullivan: Mr. Berman drew the document.

The Court: Well, let him familiarize the Jury then with it.

Mr. Sullivan: Yes, your Honor.

The Court: Give him the pointer.

Mr. Sullivan: Q. Mr. Berman, I will ask you at this time [3147] to take the pointer which I have handed you and to refer to that diagram and explain to the ladies and gentlemen of the Jury just what that diagram illustrates, particularly referring to the entire floor plan, the diagram on the right.

A. For the edification of the Jury I would like to have made this floor plan larger, but there wasn't sufficient space on the blackboard to do so and still have——

The Court: Just a minute. Just familiarize the Jury with it.

The Witness: This is the Townsend Street entrance. The Townsend Street property line here, our loading platform came back at street level about twenty feet. This indentation was put in to

(Testimony of Henry Eugene Berman.)

accommodate our big truck because of the great length of the truck, and after we dug out a space in the floor itself the truck could be unloaded at truck level, or at platform level here instead of having to put a plate there and go up and down onto the truck. When he backed in the back of the truck would be at the floor level.

There was a small flight of stairs over in this corner and that enabled us to get from the street level into the plant itself. Here these three lines designate these stairs that would take you upstairs into the office on the mezzanine which was immediately over this recessed space here. That was an approximate space of about eight to ten feet between the loading platform there and Mr. Goddard's office here with [3148] a door facing Townsend Street. Back here this line, the initials "H. B.", designate a desk out in the open floor where I did my work and my boys, my truck drivers, would check in their tags at night and in the morning go on their routes. This little space here represents a scale, a floor scale that was set right into the concrete, and a shelf that was attached to the back of Mr. Goddard's office and was in effect part of this floor scale.

These three rooms here designate a stationery room, where stationery and supplies were kept here, and two rest rooms here. This entire area was floor and warehouse space.

Now, down here is the candling room. The door to the candling room came in to this side here. The

(Testimony of Henry Eugene Berman.)

candling room is approximately sixty foot long by twelve foot wide. In there, here, were a set of freezers, an ice box, freezer No. 1—cooler No. 1 was approximately 12 foot wide and 20 foot long. Across here was a small sharp freezer, which was the same width, approximately 12 foot, and about 8 foot in length. The door to this little freezer was on the inside of ice box No. 1. Ice box No. 2 was the same approximate dimension as ice box No. 1, twelve by twenty. The large ice box was a freezer of the approximate dimensions of twelve by forty.

Here there was a recess about six foot wide, if my memory serves me correctly, and there was a compressor along that space at one time which was later moved and the empty [3149] in there remained. This was our butter room which was the same width as the other, approximately twelve feet. That is about eighteen to twenty foot long. The egg breaking room was down in this corner of the building, the same width of approximately twelve feet and about eight or ten foot long. This designation here is—that faced Bluxome Street—it was closed in on the outside by wainscoating up about four feet and chicken wire the rest of the way with a sliding door here so that the scavengers might take the refuse out of the plant every morning. This line here was a wall of the building, a concrete wall, and glass casements led out into Bluxome Street with a rolling type door that would permit you to go out and back.

(Testimony of Henry Eugene Berman.)

Q. Would you now refer to the smaller diagram designated "Mezzanine" and explain to the ladies and gentlemen of the Jury and to his Honor the various positions and partitions which you indicate there.

Mr. Pratt: Is that the same scale?

Mr. Sullivan: Will you please allow the witness to answer the question and if there is anything you want to ask——

Mr. Pratt: I want to know if it is the same scale.

Mr. Sullivan: I submit the witness is entitled to answer the question—there is a pending question—and if Mr. Pratt wants to examine him on voir dire or beforehand he can ask—— [3150]

The Court: What is before the Court?

Mr. Sullivan: There is a pending question. If the Court please, I want him to explain the smaller drawing of the mezzanine.

Mr. Pratt: I interjected the question whether it was to the same scale. It seems to me——

The Court: Is this diagram drawn to a scale?

The Witness: Yes sir, to the best of my ability.

The Court: Tell the Jury what the scale is.

The Witness: A. This mezzanine was approached by the flight of stairs here on the corner of the main floor going up into a long corridor. The scale of the main office upon the mezzanine, including the corridor, was exactly the same as the recess to the loading platform. In other words, posts were along the edge of this loading platform

(Testimony of Henry Eugene Berman.)

supporting the mezzanine right to the outside edge of this balcony. There was a long corridor here, an open corridor with a banister that overlooked the floor of the plant. There was a wainscoating here, a partition about three foot high, and from three foot to the ceiling, I guess it was about ten or twelve foot high, that was open, not absolutely open, but was glassed in so it was visible on looking into it. In this corner here was a private office, a conference room, with an office here. There were two decks facing each other where Mr. Moncharsh and Mr. Smith worked. This is the main office where all the [3151] clerical force did their work. Over here there were two offices. This section here on this floor plan here would extend over the office of Mr. Goddard and it in effect was supported by the ceiling of Mr. Goddard's office. There were two offices there. Back in here was a filing room and in here was another office with a desk.

Mr. Sullivan: Q. Mr. Berman, I will ask at this time that you remain here close to the board and I will ask you what is your recollection of the distance from the breaking room which you have drawn here on the larger diagram to the office of Ruby Goddard which you have written in there; what is that approximate distance?

A. Well, that distance would be well over two hundred feet.

Q. You have indicated here an area extending from the rear of the plant and going up, according to visual observation of this diagram, about half

(Testimony of Henry Eugene Berman.)

way, in which are located the butter room, the breaking room—rather, the butter room, the first and second coolers and the freezer; I will ask you if you can state approximately what proportion of the entire length or depth of two hundred fifty feet of the building did the area which you have just designated occupy? A. In depth?

Q. Yes. A. Approximately a half.

Q. You have indicated here then a distance or a space along the exterior wall of the building in which there is an indentation, freezer No. 3, and in which the next indentation out from [3152] the exterior wall is the rest room. Do you mean to indicate by that that there was a place in there without any other partition?

A. That's right.

Q. So that the distance out here from the point which I just mentioned, the exterior wall of the building, to the other exterior long wall of the building would be approximately fifty feet, would it? A. That is correct.

Q. You have also indicated in the lefthand corner of this diagram the candling room of Nye & Nissen, and I notice that you have drawn the candling room approximately a little over half of the distance, or approximately half of the distance of the length of the various units which are on the righthand side of the building, and then with freezer No. 3; is it your recollection and is it your testimony that that is the approximate relationship?

(Testimony of Henry Eugene Berman.)

A. Yes. The end of the candling room came about the middle of ice box No. 2.

Q. From the end of the candling room, and by that I mean the end of the candling room nearest Townsend Street, to Mr. Ruby Goddard's office, was about, with the exception of any inventory present at a given time, was that an open space without partitions? A. That's right.

Q. You have drawn a doorway down here. I don't know whether I understood you exactly; did you mention that if there was a door there what kind of door it was?

A. Yes, this was a rolling door. [3153]

Q. What do you mean?

A. Well, it is a door where by means of a chain or pulley you can pull it up or down.

Q. Of what type of construction was it?

A. It was a steel door, if I remember correctly.

Q. When that steel door was lowered or raised did it make a noise?

A. It certainly did.

Q. Do you know whether during the period we are discussing there was any difficulty in operating that door?

A. Well, it always took more than one man; that I know.

Q. Where in this area during the period that you were on the premises of the plant at Nye & Nissen on Townsend Street, where on that particular area were the inventories of eggs placed usually?